FOR ARGUMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-837

NEW MOTOR VEHICLE BOARD OF THE STATE OF CALIFORNIA, and the DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF CALIFORNIA, and DORIS V. ALEXIS, as Director of the Department of Motor Vehicles of the State of California,
Appellants,

vs.

ORRIN W. FOX CO., a corporation; MULLER CHEVROLET, a corporation; and GENERAL MOTORS CORPORATION,
Appellees.

On Appeal from the United States District Court for the Central District of California

REPLY BRIEF FOR APPELLANTS

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SUBJECT INDEX

	Page
Preliminary statement	1
Argument	3
Appellees' claim that the California Automobile Franchise Act is preempted by reason of conflict with Federal Antitrust law cannot stand as an alternative ground for affirmance of the district court's partial summary judgment	3
A. Invalidation of a state statute upon the assertion that it conflicts with federal antitrust law is unwarranted where no conduct violative of any federal antitrust statute has been pleaded, proved or found, and where no such conduct has been shown to be ratified or encouraged by the state statute	3
B. Even if the operation of the Act produced a result otherwise violative of a federal antitrust statute, that result would be permissible as state action under the doctrine of Parker v. Brown, 317 U.S. 341 (1943)	15
Conclusion	23

TABLE OF AUTHORITIES CITED

Cases

	Page
Aetna Cas. & Sur. Co. v. Flowers, 330 U.S. 464 (1947)	2
A. F. of L. v. American Sash Co., 335 U.S. 538 (1949)	20
American Motor Inns Inc. v. Holiday Inns Inc., 521 F.2d 1230 (3d Cir. 1975)	8, 9, 10
Bates v. State Bar of Arizona, 433 U.S. 350	16, 20
Bennett v. People of the State of California, 406 F.2d 36 (9th Cir. 1969), cert. den. 394 U.S. 966	3
California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972)	7
Cantor v. Detroit Edison Co., 428 U.S. 579 (1976)	20
City of Lafayette v. Louisiana Power & Light Co. ....U.S. ...., 55 L.Ed.2d 364 (1978)	15
Dandridge v. Williams, 397 U.S. 471	2
Dean Milk Co. v. Madison, 340 U.S. 349 (1951)	22
Eastern Railroad Presidents' Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961)	7
Exxon Corp. v. Governor of Maryland, ... U.S. ...., 57 L.Ed2d 91 (1978)	5, 11, 22, 23
Ferguson v. Skrupa, 372 U.S. 726 (1963)	14

TABLE OF AUTHORITIES CITED

	Page
Florida Lime v. Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963)	13
Great Atlantic & Pacific Tea Co. v. Cottrell, 424 U.S. 366 (1976)	23
H. P. Hood & Sons v. DuMond, 336 U.S. 525 (1949)	22
Joseph E. Seagram & Sons v. Hostetter, 384 U.S. 35 (1966), reh. den. 384 U.S. 967	4, 5
Langnes v. Green, 282 U.S. 531 (1931)	2
Mt. Lebanon Motors, Inc. v. Chrysler Corp., 283 F.Supp. 453 (W.D. Pa. 1968) aff'd 417 F.2d 622 (3d Cir. 1969)	17
Muskopf v. Corning Hospital District, 55 Cal.2d 211 (1961)	2, 3
Otter Tail Power Co. v. United States, 410 U.S. 366 (1973)	7
Parker v. Brown, 317 U.S. 341 (1943)	2, 9, 12, 15, 16, 17, 19, 20, 21, 22
Pike v. Bruce Church, Inc., 397 U.S. 137 (1970)	23
Ray v. Atlantic Richfield Co., ... U.S. ...., 55 L.Ed.2d 179 (1978)	3, 4, 13, 14
Rea v. Ford Motor Co., 355 F.Supp. 842 (W.D. Pa. 1973) vacated and remanded 497 F.2d 577 (3d Cir. 1974)	17
Rice v. Alcoholic Beverage Control Appeals Board (1978) 21 Cal.3d 431	13
Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947)	3
Savage v. Jones, 225 U.S. 501 (1912)	4
Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951)	11, 12, 13
Semler v. Oregon Board of Dental Examiners, 294 U.S. 608 (1935)	19
Standard Oil Co. v. United States, 221 U.S. 1 (1911)	9
State of Alabama v. Pugh, ... U.S. ...., 57 L.Ed.2d 1114 (1978)	2, 3
United Mine Workers v. Pennington, 381 U.S. 657 (1965)	7
United States v. Ballard, 322 U.S. 78 (1944)	23
Vendo Co. v. Lektro-Vend. Corp., 433 U.S. 623 (1977)	7
Waters Pierce Oil Co. v. Texas, 212 U.S. 86 (1909)	3
Watson v. Buck, 313 U.S. 387 (1941)	3
Williamson v. Lee Optical of Oklahoma, 348 U.S. 483 (1955)	14

TABLE OF AUTHORITIES CITED

Constitutions

	Page
California Constitution, Article 3, Section 5	2
United States Constitution, Eleventh Amendment	3

Statutes

California Government Code:	
Section 3066	19
Section 3067	19
Sections 11500 et seq.	21
California Vehicle Code:	
Section 3062	10, 22
Section 3063	18
Section 3066	10, 22
Section 3067	10, 22
Automobile Dealers Day in Court Act, 15 U.S.C.:	
Sections 1221-1225	4
Section 1224	4
Section 1225	4
Clayton Act, Section 2	5
Miller-Tydings Act (50 Stat. 693 (1937), repealed 89 Stat. 801 (1976)	12
Sherman Act, Section 1	6, 7, 8, 12

Texts

Donnem, *Federal Antitrust Laws Versus Anticompetitive State Regulation*, 39 Antitrust L.J. 950, 951 (1970)	15
P. Areeda and D. F. Turner, *Antitrust Law* (Boston 1978)	21

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Appellees.

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REPLY BRIEF FOR APPELLANTS

PRELIMINARY STATEMENT

In the District Court appellees alleged that the California Automobile Franchise Act (hereinafter "the Act") is "preempted by federal law and conflicts with the national economic policy expressed by the federal antitrust laws." (Appendix, p. 17.) Appellees now advance the same argument on appeal as an alternative ground for affirmance of the District Court's partial summary judgment.

The argument should not be considered on this appeal. Though the issue was previously argued to the District Court, appellees' preemption contention formed no part of

the court's reasoning in support of the partial summary judgment. Rather, the court expressly declined to consider appellees' preemption claim (440 F.Supp. at 441) and deliberately limited its partial summary judgment to appellees' procedural due process claim. (Jurisd. Stmt. Exhibit E, p. 56.)

The refusal of the District Court to predicate judgment in any part upon appellees' claim of preemption was prudent: neither the pleadings nor the evidentiary record before the District Court provided a satisfactory basis for upholding the claim, particularly in light of the law applicable to consideration of state regulatory interests under this Court's decision in *Parker v. Brown,* 317 U.S. 341 (1943). In such circumstances, although it is appellees' privilege to assert the claim in support of the judgment *(Langnes v. Green,* 282 U.S. 531, 538-539 (1931)), the decisions of this Court counsel against consideration of the asserted alternative ground for affirmance on review, and in favor of deferral of the question for the lower court's adjudication on remand, where as here the attention of the court below was focused upon other issues and that court expressed no views on the question which appellees contend is controlling. *(Aetna Cas. & Sur. Co. v. Flowers,* 330 U.S. 464, 468 (1947); see *United States v. Ballard,* 322 U.S. 78, 88 (1944); cf. *Dandridge v. Williams,* 397 U.S. 471, 475, fn. 6.)[1]

[1]The state agencies named as defendants herein are entitled, upon such remand, to an order dismissing the suit as to them. (*State of Alabama v. Pugh,* .... U.S. ...., 57 L.Ed.2d 1114, 1116 (1978).)

Article 3, section 5 of the California Constitution, providing that "[s]uits may be brought against the state in such manner and in such courts as shall be directed by law," authorizes consent to suit by action of the California legislature. (See, e.g., *Muskopf v. Corning Hospital District,* 55 Cal.2d 211, 217-218 (1961). The complaint herein contains no allegation that consent has been given to the filing of this suit against the several state agencies. (See *Bennett v. People of the State of California,* 406 F.2d 36, 39 (9th Cir. 1969), cert. den. 394 U.S. 966) In the absence of consent, the State of California and its administrative agencies are immune from suit under the Eleventh Amendment. (*State of Alabama v. Pugh, supra,* 57 L.Ed.2d at 1116).

ARGUMENT

APPELLEES' CLAIM THAT THE CALIFORNIA AUTOMOBILE FRANCHISE ACT IS PREEMPTED BY REASON OF CONFLICT WITH FEDERAL ANTITRUST LAW CANNOT STAND AS AN ALTERNATIVE GROUND FOR AFFIRMANCE OF THE DISTRICT COURT'S PARTIAL SUMMARY JUDGMENT.

A. Invalidation of a state statute upon the assertion that it conflicts with federal antitrust law is unwarranted where no conduct violative of any federal antitrust statute has been pleaded, proved or found, and where no such conduct has been shown to be ratified or encouraged by the state statute.

In any case in which a state's exercise of the police power is challenged under the Supremacy Clause by reason of alleged preemption by a federal statute, this Court's decisions require "the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *(Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947); see *Ray v. Atlantic Richfield Co.,* ..... U.S. ....., 55 L.Ed.2d 179, 188 (1978).) In the field of antitrust it is clear that Congress never intended passage of the Sherman Act to preclude state regulation affecting the same subject. Thus, it has long been established that the states are free to enact antitrust legislation which is not in conflict with the federal law. *(Watson v. Buck,* 313 U.S. 387 (1941), *Waters Pierce Oil Co. v. Texas,* 212 U.S. 86 (1909).) In the absence of an express or implied intention on the part of Congress to exclude the states from legislat-

ing in a given area, a state statute is void under the Supremacy Clause only to the extent that it conflicts with a valid federal statute.[2] In such circumstances, "[a] conflict will be found where compliance with both federal and state regulations is a physical impossibility . . .' [Citation] or where the state 'law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' [Citations]" *(Ray v. Atlantic Richfield Co., supra,* 55 L.Ed.2d at 188-189). Moreover, the rule is clear that an actual conflict must be made clearly to appear before the state law will be deemed invalid under the Supremacy Clause. *(Savage v. Jones,* 225 U.S. 501, 533 (1912).)

That an actual conflict, clearly shown, must be present to support claims of inconsistency of state law with federal antitrust law, is clearly established. *(Joseph E. Seagram & Sons v. Hostetter,* 384 U.S. 35 (1966), reh. den. 384 U.S.

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[2]Appellees' reliance upon the Automobile Dealers Day in Court Act (15 U.S.C. §§ 1221-1225) as evidence of preemption of the Act by federal antitrust law is misplaced. Though it may be conceded that, as appellees suggest, the Automobile Dealers Day in Court Act provides some indication that "Congress intends the antitrust laws to apply fully to automobile franchising policies," the federal act by no means dictates the conclusion that federal preemption of the subject of the California Act has occurred. In fact, the federal act explicitly provides:

> "This chapter shall not invalidate any provision of the laws of any State except insofar as there is a direct conflict between an express provision of this chapter and an express provision of State law which can not be reconciled."

(15 U.S.C. § 1225) The fact that the same Act, in section 1224, also specifies that it does not "repeal, modify, or supersede" any provisions of federal antitrust law (Appellees' Brief, p. 44) merely indicates that in enacting the Automobile Dealers Day in Court Act, Congress intended any question of such preemption to be resolved without reference to that statute, which neither expands the reach of the federal antitrust laws nor diminishes the authority of the states to regulate the business of motor vehicle marketing.

967).[3] Appellees, however, neither allege nor prove any direct conflict between any provision of the Act and any provision of any federal antitrust statute. Rather, appellees have argued that the Act is preempted by reason of conflict "with the national economic policy expressed by the federal antitrust laws," (Appendix, p. 17).[4] As this Court recently observed of a different, though similarly-directed argument in *Exxon Corp. v. Governor of Maryland,* ..... U.S. ....., 57 L.Ed.2d 91 (1978):

> "This is merely another way of stating that the . . . statute will have an anticompetitive effect . . . Nevertheless, this sort of conflict cannot itself constitute a sufficient reason for invalidating the . . . statute. For if an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the states' power to engage in economic regulation would be effectively destroyed."

(57 L.Ed.2d at 104-105, footnote omitted.)

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[3]In *Seagram and Sons, supra,* this Court rejected a claim that a New York requirement involving compilation of price information on liquor sales to wholesalers and retailers by distillers was inconsistent with various provisions of the Sherman Act and section 2 of the Clayton Act, observing, "In this as in other areas of coincident federal and state regulation, the 'teaching of this Court's decisions . . . enjoin[s] seeking out conflicts between state and federal regulation where none clearly exists' *Huron Cement Co. v. Detroit,* 362 U.S. 440, 446. We find no such clear conflict in the present case." (384 U.S. at 45)

[4]Appellees asserted that the Act "purports to ratify combinations or conspiracies by the existing motor vehicle franchisees to prevent competition and encourages the formation of such combinations and conspiracies" (Appendix, (p. 17), and that the ability of "one or more actual or potential competitors unilaterally to invoke the injunctive process of the New Motor Vehicle Board . . . is akin to the classical horizontal territorial and market allocations . . . which have uniformly been held to constitute *per se* violations of Section 1 of the Sherman Act." (Appendix, pp. 128-129. See Appellees' Brief p. 42.)

Although cast in the broadest of terms, appellees' claim of preemption by conflict relies specifically and exclusively upon an assertion that dealer conduct in initiating state regulatory procedures under the Act is "akin" to a violation of Section 1 of the Sherman Act. The argument is that "the challenged portions of the Act confer unrestrained power on private persons, acting alone or in concert, to invoke state power to preserve their position in the market place for extended periods of time by arbitrarily precluding the entry or relocation of horizontal competitors." (Appellees' Brief, pp. 45-46, footnote omitted.) Even examined upon its own terms, however, upon the present record the argument is insufficient to justify invalidation of the state regulatory program as being in conflict with federal antitrust law.

Though the complaint speaks specifically in terms of section 1 of the Sherman Act when it alleges "ratif[ication of] combinations or conspiracies by existing motor vehicle franchisees" and "encourage[ment of] the formation of such combinations and conspiracies" (Appendix p. 17), appellees' proof not only fails to establish the existence of a section 1 violation but additionally fails to demonstrate that the Act either ratifies or encourages conduct likely to constitute such a violation.

First, in the trial court appellees not only failed to assert the existence of any agreement, combination or conspiracy, under Section 1 of the Sherman Act, but affirmatively acknowledged that the possible dealer conduct with which they took issue was the ability "*unilaterally* to invoke the injunctive process of the New Motor Vehicle Board." (Appendix, pp. 128-129, italics added.) Under these circumstances appellees' continuing reference to dealer con-

duct in terms of horizontal territorial and market allocations constituting *per se* violations of Section 1 of the Sherman Act (see Appellees' Brief, p. 42) is meaningless inasmuch as no combination or conspiracy, either vertical or horizontal, is shown to exist and hence no conduct violative of Section 1 is present.

Second, appellees' assertion on appeal that the Act "confers . . . power on private persons . . . to invoke state power to preserve their position in the market place . . ."(Appellees' Brief, p. 45) is ineffectual to establish a confiict with federal law. In the absence of conspiracy or the exercise of monopoly power, the private purpose to preserve a market position has never been held, in and of itself, to violate the Sherman Act. Moreover, this Court has on more than one occasion held that resort to governmental processes, even for the specific purpose of eliminating competition, does not violate the antitrust laws *(California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 510 (1972); *United Mine Workers v. Pennington,* 381 U.S. 657, 670 (1965); *Eastern Railroad Presidents' Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127, 136-137 (1961)) and has confirmed that this principle, based upon the right to petition, extends "to all departments of the Government." *(California Motor Transport Co., supra,* 404 U.S. at 510).[5]

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[5]If appellees were victims of a bad faith resort to the state procedures established by the Act, their remedy against protesting dealers for harrassive, sham proceedings of a repetitive nature is established by *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 513 (1972). (See, also, *Vendo Co. v. Lektro-Vend. Corp.,* 433 U.S. 623, 635, (1977) (footnote 6), *Otter Tail Power Co. v. United States,* 410 U.S. 366, 379-380 (1973).) This Court has never suggested, however, that abuse of available process in such a case would necessitate or justify invalidation of the procedures abused.

In the absence of private conduct violative of a federal antitrust statute, appellees' suggestion that the Act "ratifies" or "encourages" such conduct cannot be credited. Lacking proof of a violation thus "ratified" or "encouraged," by the Act, appellees indulge in a facile comparison between the Act's provisions and a market allocation program employed by Holiday Inns, Inc., which was held by the Third Circuit to constitute a *per se* violation of section 1 of the Sherman Act in *American Motor Inns Inc. v. Holiday Inns Inc.*, 521 F.2d 1230 (3d Cir. 1975). The scheme condemned in *Holiday Inns*, however, was entirely unlike the operation of the Act's provisions in all but the most superficial respects. Whenever an application for a franchise was received, Holiday Inns, Inc., as franchisor, solicited comments on the application from the three existing franchisees closest to the proposed site of the new franchise. As appellees themselves point out, responses objecting to the new franchise were treated by the franchisor "as an unreviewable 'veto'" (Appellees' Brief, fn. 38, p. 46), leading the Third Circuit to conclude that the scheme impermissibly enabled the existing franchisees "to divide that market between themselves, thus precluding further intrabrand competition." (521 F.2d at 1242)

Reference to the conduct disapproved in *Holiday Inns* typifies appellees' attempt to foreshorten the focus of examination of the Act and is indicative of the analytical distortion which results. Only by focusing upon the causal relation between the filing of a protest and the delay attendant upon normal administrative procedures, to the exclusion of all administrative procedures which attend the ensuing decision making process, can appellees suggest

even the appearance of a resemblance between the conduct in *Holiday Inns* and the operation of the Act. To say that this treatment parses the statute too discretely is an understatement. By asking the Court conclusively to presume an impermissible result from the thoroughly permissible unilateral conduct of one protesting dealer, appellees' attempted atomization of the statutory program seeks to dispense with any examination of the extent to which the Act's operation (either by delaying the franchisor's plans or by ultimately disallowing them) actually restrains competition or trade, if indeed it does so at all.

Appellees' attempt thus to deflect inquiry away from the Act's consequence to the market is undoubtedly accounted for by the fact that, far from establishing that the Act effectuates anything like an unreasonable restraint of trade (*Standard Oil Co. v. United States*, 221 U.S. 1 (1911)), appellees presented no evidence of the Act's impact in the marketplace. Had appellees proved that the filing of protests led to an unreasonably high incidence of Board decisions prohibiting dealer establishments or relocations, for example, then a resemblance between the *Holiday Inns* scheme and the Act's operation might have been established.[6] But, as appellees themselves acknowledge, the operation of the regulatory process itself has *not* resulted in any such incidence of prohibitions on the es-

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[6]Such resemblance would not necessarily indicate that a combination or conspiracy had occurred or even that the Act permitted, much less ratified or encouraged, conduct violative of the Sherman Act. Nor would such resemblance in and of itself preclude application of the immunity for state action conferred under the doctrine of *Parker v. Brown*, 317 U.S. 341 (1943). Existence of the alleged resemblance, in other words, could not in and of itself establish a conflict with federal antitrust law.

tablishment of new franchises or the relocation of existing dealerships.[7]

When the Act's pertinent provisions are considered as a whole, it is obvious that the foreclosure of competition by private parties, which necessarily resulted from the "veto" in the *Holiday Inns* scheme, has no counterpart under the Act. In fact, far from constituting a veto of any sort, the filing of a dealer protest under the Act initiates the very administrative factfinding and decisionmaking procedures (Cal. Veh. Code §§ 3062, 3066 and 3067) which, in direct contrast to the result identified in *Holiday Inns,* ensure that no franchisee's opposition to a new dealership can ever operate as a "veto," since unless a decision of the New Motor Vehicle Board positively bars the establishment or relocation of the dealership on behalf of the public interest, the proposed action must be deemed approved. (Cal. Veh. Code § 3067)[8]

[7]At page 65 of their brief, appellees assert that protests "are in fact almost never upheld on the merits".

[8]Appellees' reliance upon a letter of the California Attorney General to the legislative author of the California Act, expressing concern over a perceived anticompetitive effect of the original bill is likewise misplaced. Appellees advert upon the following language in the Attorney General's letter of August 3, 1973, addressed to State Assemblyman J. A. Gonsalves:

> "Assembly Bill 225 . . . has an apparent anticompetitive effect on the new car market . . .
>
> "The bill does not directly prohibit the establishment of a new dealership if some or all of the line-make dealers decide to restrict competition. The effect will, however, be virtually the same, and will result in a situation precluded by current statute and case law.
>
> "Under present law, if the dealers decided among themselves to allocate territories, their action would constitute a *per se* violation of the Sherman Antitrust Act. *White Motor Co. v. United States,* 372 U.S. 253 (1963)."

Thus because the present record demonstrates no private conduct violative of federal antitrust law, and because even private use of the Act's procedures in a manner which might contravene federal law is wholly speculative, appellees' assertion of invalidating conflict amounts to nothing more than the suggestion that the Act's procedures "ratify" or "encourage" resort to the state regulatory program in a manner which might be inconsistent with the economic policies underlying the federal antitrust laws. This Court has never sanctioned invalidation of legislative implementation of a considered state policy upon such slender grounds. (See, *Exxon Corp. v. Governor of Maryland, supra,* 57 L.Ed. 91, 104-105.

Appellees, however, argue that no actual statutory violation need be demonstrated in order to invalidate the Act, and point to the result in *Schwegmann Bros. v. Calvert*

(Appellees' Brief, p. 47. See also, Appendix, pp. 269, 270.)

Appellees conveniently ignore the portion of the letter which explained the reason for opposition to the original bill in light of the bill's particular provisions. That explanation, which is omitted after the first sentence excerpted by appellees, stated:

> ". . . Specifically, the bill requires an automobile manufacturer to notify each dealer in the same line-make in a given metropolitan area or community of its intent to establish or relocate an additional dealership in that area. *Any single dealer may then file a protest with the New Motor Vehicle Board, which determines whether good cause for an additional dealership exists. The manufacturer has the burden of proof to establish good cause before the Board. In connection with this, he must establish that additional competition is required in the market area.*"

(Appendix, pp. 269-270, italics added.)

As appellants pointed out in the court below, the measure which the California Attorney General criticized was thus in practical effect a different bill from the one which was ultimately enacted. (Defendants' Memorandum of September 21, 1976, Re Letter of California Attorney General, with exhibits.)

Distillers Corp., 341 U.S. 384 (1951) as evidence of this proposition. *Schwegmann*, however, provides no support for this assertion. In *Schwegmann*, the State of Louisiana, through a resale price maintenance statute permitted under the Miller-Tydings Act (50 Stat. 693 (1937), repealed 89 Stat. 801 (1976)), authorized distributors and retailers to enter into resale price maintenance contracts establishing minimum prices for the retail sale of liquor. The same state statute also provided for the enforcement of the price maintenance contract against non-signer retailers by authorizing suit against non-signers who knowingly undersold a signatory retailer. But for the Miller-Tydings Act's exemption of state fair trade statutes from the federal antitrust laws, the contract, given operation under both provisions of the Louisiana statute, would have constituted a clear violation of section 1 of the Sherman Act. (341 U.S. at 386, 387) The Court acknowledged the resale price maintenance agreement provisions of the statute to be within the Miller-Tydings exemption but held that the exemption did not extend to the provisions which purported to render non-signers amenable to suit for unfair competition. The contract in its application to non-signers thus remained illegal under the Sherman Act since "[t]he fact that a state authorizes the price fixing does not, of course, give immunity to the scheme, absent approval by Congress." (341 U.S. at 386)[9] Thus *Schwegmann* authorized no finding of a conflict with the federal antitrust laws simply upon the broad assertion that some conduct allegedly "akin" to an antitrust violation occurs under the state act; nor did *Schwegmann* relieve appellees of the necessity of demonstrating some conduct violative of a federal antitrust statute in the court below, to justify the contention that the Act conflicts with the federal law.[10]

[9]The Court in *Schwegmann* stated: "It should be noted in this connection that the Miller-Tydings Act expressly continues the prohibitions of the Sherman Act against 'horizontal' price fixing by those in competition with each other at the same functional level. Therefore, when a state compels retailers to follow a parallel price policy, it demands private conduct which the Sherman Act forbids. See *Parker v. Brown*, 317 U.S. 341, 350. Elimination of price competition at the retail level may, of course, lawfully result if a distributor successfully negotiates individual 'vertical' agreements with all his retailers. But when retailers are *forced* to abandon price competition, they are driven into a compact in violation of the spirit of the proviso which forbids 'horizontal' price fixing. A real sanction can be given the prohibitions of the proviso only if the price maintenance power granted a distributor is limited to *voluntary* engagements. Otherwise, the exception swallows the proviso and destroys its practical effectiveness." (341 U.S. at 389)

[10]Appellees correctly point to the recent decision of the California Supreme Court in *Rice v. Alcoholic Beverage Control Appeals Board* (1978) 21 Cal.3d 431 as an example of a result similar to that reached by this Court in *Schwegmann*. Appellees err, however, in supposing that *Rice* ignored the existence of an antitrust violation in the conduct resulting under the state statute in question in that case (Appellees' Brief 45). Indeed the California high court explicitly stated, "We begin with the proposition that if the conduct of the liquor producers in fixing minimum retail prices did not have governmental sanction or if the imposition of minimum prices upon retailers was not required by the state, but was discretionary with the producer ,there would be a clear violation of the Sherman Act." (21 Cal.3d at 439) To make the point even more plain, the California court's opinion quoted directly the language of Mr. Justice Douglas in the *Schwegmann* decision, holding that the marketing arrangement there considered "would be illegal, that it would be enjoined, that it would draw civil and criminal penalties, and that no court would enforce it." (341 U.S. at 386, cited at 21 Cal.3d at 439-440)

The record in this case thus demonstrates neither an impossibility of compliance with both the Act and federal antitrust law (*Florida Lime v. Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963) nor any obstacle posed by the Act to accomplishment or execution of the federal law. (See, *Ray v. Atlantic Richfield Co., supra*, 55 L.Ed.2d

at 188-189) such as would justify a holding of preemption of the Act by conflict with the federal law. For the Court to entertain appellees' assertion of preemption upon this record would be to countenance invalidation of state legislation under the Sherman Act merely upon the unproven allegation that it "encourages" private conduct which neither the Sherman Act nor any other federal antitrust law specifically prohibits. To permit such a result necessarily sanctions nullification of State laws whose only conflict is with a particular economic theory, and thus goes dangerously far toward a return to "the time when courts used the Due Process Clause 'to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.'" (*Ferguson v. Skrupa,* 372 U.S. 726, 731-732 (1963)) This course was long ago rejected by the Court (*Williamson v. Lee Optical of Oklahoma,* 348 U.S. 483, 488 (1955)) and the proposed return thereto has since been firmly declined. (*Ferguson, supra,* 372 U.S. at 732) This Court having abandoned the course once traveled by way of the Due Process Clause, that excursion ought not be resumed by way of the comparably-broad contours of "the national economic policy" of the federal antitrust laws.[11]

[11]The spectrum of state laws potentially to be affected by resort to the form of conflict analysis which appellees' argument suggests, extends well beyond the field of motor vehicle marketing and far beyond the borders of California. The breadth of the array of laws in all states which would be affected by such an analysis is suggested by the examples of possibly anticompetitive state laws enumerated by one writer in 1970:

> "Some randomly selected areas include: state control over prices and margins, Sunday closing and other blue laws, restrictive sign-posting regulations such as those which impede price competition between gas stations and between other retail establishments by prohibiting price signs except those too small to be seen, state taxation schemes which discriminate among competitors, building and construction regulations which favor some competitors over others, zoning ordinances or practices used to prevent entry by competitors into certain areas, restrictions on bank branching, "Buy American" and in-state preference laws affecting state purchasing, occupational licensing, restrictions on the advertising of retail prescription drugs and other retail drug restrictions, "fair trade" laws, and franchising practices designed to maximize state or city revenue by insulating franchisees from competition."

(Donnem, *Federal Antitrust Law Versus Anticompetitive State Regulation,* 39 Antitrust L.J. 950, 951 (1970))

B. Even if the operation of the Act produced a result otherwise violative of a federal antitrust statute, that result would be permissible as state action under the doctrine of Parker v. Brown, 317 U.S. 341 (1943).

In the previous section of this Argument appellants have pointed out that no violation of federal antitrust law has been shown in this case and hence the record is inadequate to support appellees' assertion that the Act conflicts with the federal antitrust laws by ratifying or encouraging conduct violative of those laws. In *Parker v. Brown,* 317 U.S. 341 (1943), this Court gave effect to a rule, grounded in the principle of federalism, (*City of Lafayette v. Louisiana Power & Light Co.* ..... U.S. ....., 55 L.Ed.2d 364, 374-375 (1978)) which additionally precludes invalidation of the Act, even if it should be concluded that its operation produces a result otherwise violative of federal antitrust law. Hence if the Court were to hold that the record before it justified consideration of the antitrust conflict claim, appellees' argument would nonetheless fail as an alternative ground for affirmance of the District Court's partial summary judgment, for even when state law produces a decidedly anticompetitive

result, such action is not violative of the federal antitrust laws when undertaken by state officials pursuant to an articulated state policy to substitute a system of regulation over a business activity in place of unfettered competition. (*Parker, supra,* 317 U.S. at 351-352; *Bates v. State Bar,* 433 U.S. 350, 361-362 (1977))

In *Parker* the Court held that nothing in the language or the history of the Sherman Act suggested a Congressional purpose to restrain state action and that because "[i]n a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, and an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress" (317 U.S. at 350-351), the Sherman Act did not prohibit the state from imposing a restraint of trade as an act of government.

Observing that the Sherman Act made no mention of the state as such, the Court observed that there was no suggestion of a purpose to restrain state action in the Act's legislative history. Thus, the Court concluded:

> "... Here the state command to the Commission and to the program committee of the California Prorate Act is not rendered unlawful by the Sherman Act since, in view of the latter's words and history, it must be taken to be a prohibition of individual and not state action. It is the state which has created the machinery for establishing the prorate program. Although the organization of a prorate zone is proposed by producers, and a prorate program, approved by the Commission, must also be approved by referendum

> of producers, it is the state, acting through the Commission, which adopts the program and which enforces it with penal sanctions, in the execution of a governmental policy. . . .
>
> "The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit."

(317 U.S. at 352)

The doctrine of *Parker v. Brown* is clearly applicable to the present case. California has plainly indicated its intention to displace unfettered competition with a program of state business regulation. The declaration of legislative purpose which accompanied the Act's passage in 1973 expressed the concern of the Legislature for avoidance of undue franchisor control over the independent dealer which had historically attended the unregulated retail market level. (Appendix 165-166) (See, e.g., *Rea v. Ford Motor Co.,* 355 F.Supp. 842 (W.D. Pa. 1973) (operation of "factory stores," fleet sales through independent dealer at factory-fixed prices, *inter alia*) vacated and remanded 497 F.2d 577 (3d Cir. 1974); *Mt. Lebanon Motors, Inc. v. Chrysler Corp.,* 283 F.Supp. 453 (W.D. Pa. 1968) (proliferation of "factory stores" in competition with independent dealerships, price-cutting, saturation advertising) aff'd 417 F.2d 622 (3d Cir. 1969).) The Act was declared to be the legislative response to that concern, and to the related need to ensure fulfillment of dealer obligations and adequacy of service to consumers, in light of the finding that the sale of new motor vehicles within

the state "vitally affects the general economy of the State and the public welfare." (Appendix, p. 165)

In response to these concerns the Act displaced the previous state of unregulated intrabrand competition in the new motor vehicle market with a set of values identified by the Act itself, expressed in terms of criteria for the determination of good cause for disallowance of proposed establishments or relocations of dealerships. (California Vehicle Code section 3063).[12] In giving effect to the values identified by the Legislature, the Act substituted the sovereign authority of the state for the unilateral discretion of the franchisor to create or defeat competition among its franchisees. Under the state's authority, additional franchises may still be established and existing franchises may still be relocated, subject however to considerations of the public welfare which include, but are not limited to, the maintenance or increase of competition among common line-make franchisees. Quite clearly, the

[12]California Vehicle Code Section 3063 provides:

"In determining whether good cause has been established for not entering into or relocating an additional franchise for the same line-make, the board shall take into consideration the existing circumstances, including, but not limited to:

"(1) Permanency of the investment.

"(2) Effect on the retail motor vehicle business and the consuming public in the relevant market area.

"(3) Whether it is injurious to the public welfare for an additional franchise to be established.

"(4) Whether the franchisees of the same line-make in that relevant market area are providing adequate competition and convenient consumer care for the motor vehicles of the line-make in the market area which shall include the adequacy of motor vehicle sales and service facilities, equipment, supply of vehicle parts, and qualified service personnel.

"(5) Whether the establishment of an additional franchise would increase competition and therefore be in the public interest."

program effectuated under the Act constitutes an unambiguous choice of regulation over competition in the public interest.

Second, it is the state, and not private interest, which determines the result of the program's operation in all cases to which it applies. (Cal. Gov. Code, §§ 3066, 3067) Appellees, however, dispute this reality with the contention that the role of the state under the Act does not qualify the regulatory program for antitrust immunity because imposition of delay to the franchisor's proposed action pending the administrative inquiry results from unsupervised filing of protests by franchisees. (Appellees' Brief, pp. 50-53) Focusing exclusively upon the contention that the filing of a protest results "automatically" in a "temporary injunction" against dealership establishment or relocation pending administrative inquiry (Appellees' Brief, p. 48), appellees argue that *Parker* is inapplicable because the Act provides for no "meaningful" supervision of the private conduct in the filing of the protest. (Appellees' Brief, p. 51)

Appellees' account of the Act's operation, however, is merely an apparition summoned up from the fact that California enacted a program of selective regulation rather than, for example, a universal permit requirement for every proposed dealer establishment or relocation irrespective of circumstance. California was not bound "to strike at all evils at the same time or in the same way" (*Semler v. Oregon Board of Dental Examiners,* 294 U.S. 608, 610 (1935)) and was unquestionably entitled to conclude that some proposed actions were more needful of the state's attention than others, and to exercise its police power

accordingly. (*A. F. of L. v. American Sash Co.*, 335 U.S. 538, 541-542 (1949)) Indeed the state's determination to focus the regulatory function upon those situations where the interests of affected persons are given expression, without expending its resources where no need is identified was precisely the programmatic choice embodied in the California Agricultural Prorate Act upheld in *Parker v. Brown, supra,* 317 U.S. at 346.[13]

Moreover, under the California Act the protesting dealer possesses no ability to effectuate any anticompetitive result without the positive involvement of the state. The state's involvement is no less real merely because initial post-protest delay results directly from the legislative enactment rather than an intervening adjudicatory procedures. Under *Parker* the kind and extent of procedures utilized by the state to implement its regulatory interest and policy is immaterial.[14] The inapplicability of the federal antitrust laws to state action under *Parker v. Brown,* does not depend upon the procedures by which the substantive result of a state regulatory scheme is effectuated, but rather results where a restraint of trade imposed by

[13]The California Agricultural Prorate Act created an advisory commission which, "[u]pon the petition of ten producers for the establishment of a prorate marketing plan for any commodity within a defined production zone" and following a hearing and the making of prescribed findings, was authorized to grant the petition and select a committee to formulate a proration marketing program. (*Parker, supra,* 317 U.S. at 346-347.)

[14]This is not a case in which private parties are sought to be shielded by the "state action" doctrine of *Parker.* Even in such a case, particular state procedures would be of consequence only to the extent that their absence or character demonstrated a lack of state regulatory interest or rendered state policy indiscernible. Compare *Bates v. State Bar of Arizona,* 433 U.S. 350, 361-362 (1977) with *Cantor v. Detroit Edison Co.,* 428 U.S. 579, 584-585, 594 (1976).

the state is "an act of government which the Sherman Act did not undertake to prohibit." (*Id.* 317 U.S. at 352) No decision of this Court has held that *Parker's* application depends upon utilization of particular procedures at any particular point in the regulatory process, and appellees identify no reason to impose such a condition on *Parker's* availaibility.[15]

Finally, when the Act's protest procedures are viewed as an integrated whole it is clear that control over the decision making process rests in the state and the state

[15]Appellees posit "a *Parker* requirement for adequate procedures" predicated upon the hypothesis that before state action may be deemed exempt from federal antitrust laws, "[w]hen the state regulates on a case-by-case basis at the initiative of private parties, it must provide prior procedures, as it did in *Parker,* if it is to act responsibly" (Appellees' Brief, p. 50). In support of this assertion appellees cite P. Areeda and D. F. Turner, *Antitrust Law,"* (Boston 1978) for the proposition that such procedures are required (1) for presentation of facts and argument against the challenged act, (2) for assurance of the government's conscious consideration prior to approval and (3) for judicial review of the administrative record.

Appellees' reliance upon Areeda and Turner is misplaced to the extent that appellees equate "adequate procedures" with procedures prior to initiation of state action. (Appellees' Brief, p. 50, footnote 41.) In the paragraph of *Antitrust Law* which appellees cite, the authors addressed the question whether a result which obtains by reason of State *inaction* (such as a tariff permitted to take effect in the absence of some negative administrative action by the State) qualifies as state action for purposes of *Parker.* The authors' response was in the negative because: "[s]uch inaction evades statutory approval procedures designed" to fulfill the three enumerated purposes (1 Areeda & Turner, *Antitrust Law,* Paragraph 213f, pp. 78-79). Though the *Antitrust Law* authors do conclude from this that "the general view is correct that official inaction does not constitute sufficient 'state action' to justify an antitrust exemption," the enumeration's significance is that these purposes constitute common statutory objectives of administrative procedure (see, e.g., Cal. Gov. Code §§ 11500 et seq.), which are unfulfilled by agency inaction, *not* that those objectives must be met for state action to qualify for the *Parker* exemption. In the present case, such purposes are met by explicit statutory procedures which govern the administrative decisionmaking process. (Brief for Appellants, pp. 7-9.)

alone. The filing of a protest under California Vehicle Code section 3062 leads to the calendaring of an evidentiary hearing under section 3066, which hearing is governed by specified provisions of the California Administrative Procedure Act. The decision which results is that of the New Motor Vehicle Board, an agency of the state. (Cal. Veh. Code § 3067) The Act's provisions thus by no means permit the private dealer to "masquerade" as the state (see Appellees' Brief, p. 50) or preclude "meaningful supervision" by the state. (Appellees' Brief, p. 51) Control over the substantive result of proceedings commenced under the Act resides fully within the state itself. The California program of regulation is thus clearly "state action" within the doctrine of *Parker v. Brown* and cannot be deemed to constitute an impermissible conflict with the Sherman Act.[16]

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[16]In a footnote following their discussion of the antitrust conflict claim, appellees argue that the Act violates the Commerce Clause because the prohibition on franchisor activity which attends each protest filed "affects the flow of interstate commerce by delaying the opening of a new channel of interstate commerce and by delaying the sale of new motor vehicles, parts, and accessories at certain locations for indefinite periods." (Appellants' Brief, fn. 43, p. 54.)

Assuming that state regulation of the motor vehicle retail market does "affect" interstate commerce, appellees do not contend that the Act discriminates against interstate commerce (Cf *Dean Milk Co. v. Madison* 340 U.S. 349 (1951); *H. P. Hood & Sons v. DuMond*, 336 U.S. 525 (1949)), and offer no proof that interstate commerce is burdened by the Act. But even if appellees had successfully proved that the Act's operation caused the Buick or Chevrolet line of motor vehicles to cease being sold altogether in the local market, that fact would not necessarily warrant a finding that the statute impermissibly burdens interstate commerce, absent some reason to believe that Buick's or Chevrolet's share of the interstate supply of vehicles to Pasadena or LaCanada, California, would not be promptly replaced by other interstate manufacturers. As this Court observed in *Exxon Corp. v. Governor of Maryland, supra*, "The source of consumers' supply may switch . . . but interstate commerce is not subjected to an impermissible burden simply because an otherwise valid regulation causes some business to shift from one interstate supplier to another." (57 L.Ed.2d at 101.) Appellees' argument thus ignores the teaching of *Exxon Corp., supra*, that it is interstate commerce, not merely the divisions of General Motors, which the Commerce Clause protects.

Appellees' additional suggestion that local interests are insufficient to justify the Act's "effect" on interstate commerce (Appellees' Brief, fn. 43, pp. 54-55) is material only to the question whether a burden is "clearly excessive in relation to the putative local benefits." (*Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).) That question is pretermitted by appellees' inability to demonstrate that the Act imposes *any* cognizable burden upon interstate commerce.

Finally, appellees argue that the problems to which the Act is addressed affect a nationwide industry and "are therefore problems to be addressed by Congress" rather than the states. (Appellees' Brief, fn. 43, p. 55.) Congress, however, has already stated its intention not to preclude state action in this field. (See *ante*, at footnote 2, p. 4.) Moreover, a virtually identical argument, to the effect that because the petroleum product market is nationwide, no state has power to regulate the retail marketing of gasoline, was soundly rejected in *Exxon Corp., supra*, 57 L.Ed.2d 91. There is no more reason in this case than there was in *Exxon Corp., supra*, to conclude that the Commerce Clause by its own force preempts regulation of the product market.

In any event, although a Commerce Clause claim was pleaded in appellees' complaint (Appendix, pp. 22-23), it was not only unconsidered by the District Court's opinion but was never argued by the parties. In fact, because the partial summary judgment was granted concurrent with denial of appellants' motion to dismiss and before an answer had been filed by the Board, its members, or its executive secretary, the issue was never joined as to these parties. Under these circumstances, and because the record contains no evidence of a cognizable burden on interstate commerce, much less any evidence of an *excessive* burden (*Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 371-372 (1976), appellees' Commerce Clause claim ought not be considered on this appeal. (See *United States v. Ballard*, 322 U.S. 78, 88 (1944).)

CONCLUSION

Appellees' claim that the dealership establishment and relocation provisions of the Act are preempted by reason of conflict with the federal antitrust laws is without merit and cannot stand as an alternative ground in support of

the District Court's partial summary judgment. That judgment must be assessed in light of the principles which govern the ostensible grounds for its issuance, and, so assessed, must be reversed.

Dated, September 21, 1978.

Respectfully submitted,

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